

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH MARCOTTE,	:	CIVIL ACTION
On behalf of himself and	:	NO. 05-2345
all others similarly situated	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SAMUELS & SON SEAFOOD CO., INC.	:	
and TOM CARUSO,	:	
Defendants.	:	

NEWCOMER, S.J.

July 27, 2005

MEMORANDUM AND ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Kenneth Marcotte, commenced this action on behalf of himself and all others similarly situated on April 15, 2005, by filing a Complaint in the Philadelphia Court of Common Pleas against Defendants Samuels & Son Seafood Co., Inc.

("Samuels & Son") and Tom Caruso, Samuels & Son's manager.

Plaintiffs' Complaint asserts claims against Defendants for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., the Pennsylvania Wage Payment and Collection Law (WPCL), 43 P.S. §§ 260.1, et. seq., the Pennsylvania Minimum Wage Act, 43 P.S. §§ 333.1010, et. seq., breach of contract, fraud and misrepresentation, quantum meruit, and other applicable wage and common law rights to accrued but unpaid compensation.

Plaintiff personally served Defendants on April 19, 2005. Samuels & Son has complied with 28 U.S.C. 1446(b) by filing a Notice of Removal within thirty days of service and within one

year of the filing of the initial pleading setting forth the claim for relief. Tom Caruso did not sign the Notice of Removal, file his own notice of removal, or personally inform the Court of his consent to removal within the thirty days statutorily provided.

II. DISCUSSION

A. *Samuels & Son Seafood's Notice of Removal Was Improperly Removed.*

The Third Circuit holds that in cases with multiple defendants, "all must join in the removal petition." Green v. Target Stores, 305 F. Supp. 2d 448, 449 (E.D. Pa. 2004) (quoting Lewis v. Rego Co., 757 F.2d 66 (3d Cir. 1985))(emphasis added). A defendant may effectively join the removal petition by (1) signing the removal notice; (2) filing his own notice; or (3)filing a written consent or joinder to the original notice with the federal court. See Green, 305 F. Supp. 2d at 450 (citing Landman v. City of Bristol, 896 F. Supp. 406 (E.D. Pa. 1995)). Defendant Tom Caruso failed to join the removal petition by any of these methods. Although item 19 of the Notice states: "Defendant Tom Caruso consents to removal of this matter," his consent cannot be given without filing his own notice or written consent or joinder to the original Notice with the federal court. Therefore, Samuels & Son may not speak for Tom Caruso in filing a notice of removal.

The Third Circuit provides three exceptions to the requirement of unanimity for proper removal where: "(1) the non-joining defendant is a nominal party; (2) the defendant has been fraudulently joined; or (3) a defendant had not been served when the removing defendants filed their notice of removal." Tellado v. Roto-Die, Inc., No. 04-3382, 2005 U.S. Dist. LEXIS 5075, at *4 (E.D. Pa. Mar. 29, 2005). Under any exception, Defendant "may be disregarded for removal purposes and need not join the notice of removal or otherwise consent to removal." N. Penn Water Auth. v. BAE Sys., No. 04-5030, 2005 U.S. Dist. LEXIS 10210, at *16 (E.D. Pa. May 25, 2005)(quoting Winnick v. Pratt, 2003 U.S. Dist. LEXIS 8523, at *5 (E.D. Pa. May 20, 2003)).

Because each Defendant received personal service on April 19, 2005, the third exception does not apply. In addressing whether Caruso was considered a nominal party at the time of the filing of the Notice of Removal, this Court must ask whether he was unnecessary or dispensable to the cause of action. See Winnick, 2003 U.S. Dist. LEXIS 8523, at *6.

As alleged in the Complaint, Caruso, as Samuels & Son's manager, was a statutory employer under FLSA, 29 U.S.C. § 203(d), therefore, he is necessary and indispensable to this case. Although Samuels & Son cited the Third Circuit's decision in Carpenters Health and Welfare Fund v. Ambrose, Inc. classifying statutory employers to include a corporation's highest ranking

officers, it does not preclude "lower level corporate officers or employees who are merely implementing a policy at the command of their superiors" from the same classification. 727 F.2d 279, 282-83 (3d Cir. 1983). Liability may also be based on Defendant's responsibility with respect to policy-making, decision-making, finances, or daily operations. See Local Union No. 98, IBEW v. Garney Morris, Inc., No. 03-5272, 2004 U.S. Dist. LEXIS 9528, at *19 (E.D. Pa. May 21, 2004) (defining employers under the WPCL more broadly than a corporation's highest ranking officers). Regardless of whether Caruso wields the power to make policies or decisions, his responsibilities¹ pertain to both Samuels & Son's finances and their daily operations. Accordingly, Caruso may be held personally liable as a statutory employer under the WPCL.

Likewise, dismissal for fraudulent joinder would be inappropriate because the joinder was not "wholly insubstantial and frivolous." PNC Bank, Nat'l Ass'n v. Amerus Life Ins. Co., No. 05-5015, 2005 U.S. Dist. LEXIS 1283, at *2 (E.D. Pa. Jan. 31, 2005) (quoting Batoff v. State Farm, 977 F.2d 848, 852 (3d Cir. 1992)). Moreover, any doubt to the removal procedure should be resolved in favor of remand to the state court. See Landman, 896 F. Supp. at 408. Accordingly, because Defendant Caruso has not given his express consent to removal to this Court directly,

¹ Caruso's duties included paying wages, overtime compensation, commissions, and health care premiums.

Plaintiffs' Motion to Remand must be granted. Because the entire action must be remanded due to a procedural defect, this Court need not address whether it has supplemental jurisdiction over the Plaintiffs' state-law claims. An appropriate order follows.

S/ Clarence C. Newcomer
United States District Judge

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O R D E R

AND NOW, this 27th day of July, 2005, upon consideration of Plaintiffs' Motion to Remand (Doc. 3) and Defendants' Response, it is hereby ORDERED that said Motion is GRANTED, and pursuant to 28 U.S.C. § 1447(c), this case is REMANDED to the Philadelphia County Court of Common Pleas. The Clerk of the Court shall mark this case as CLOSED for statistical purposes.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge